Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–03–29 OF 2005
JAMES FOONG, ZALEHA ZAHARI AND ZAINUN ALI JJCA
6 OCTOBER 2006

Contract — Damages — Measure of damages — Proof of damage — Nominal damages

Evidence — Proof — Admissibility — Stacks of bills and payments, audited statements, hire purchase documents — Failure to produce or tender the account books or the necessary support documents — Whether fatal to claim for damages

This appeal was against the decision made on 7 March 2005 by the learned trial judge of the High Court on the assessment of damages only. The appellant and the respondent entered into a written agreement wherein the respondent transported goods to and from the appellant's factory premises. The agreement was for 10 years, ie from 4 April 1994 to 4 April 2004. There were two main services rendered, the first was terminated on 15 February 1996 whilst the other was terminated in September 1997. It was the respondent's case that the untimely termination of the agreement by the appellant resulted in losses to the respondent as pleaded in its statement of claim. The respondent tendered in court its audited statements of account for the years 1995 to 1999. The appellant contended that the audited account for the years 1995 to 1999 referred to by the respondent did not show how the loss was attributable to the alleged breach. The appellant submitted that the stacks of bills and payments, the audited statements and the hire purchase documents do not by themselves establish the loss, if any, suffered by the respondent. The trial judge set aside the decision of the deputy registrar made earlier who awarded nominal damages of RM500 only to the respondent. The trial judge awarded the sum of RM750,000 for loss of profit and RM150,000 for loss of capital.

Held, allowing the appeal and setting aside the damages awarded:

(1) It was clear that the statements of account exhibited were by themselves not sufficient to establish the respondent's claim for damages. They only showed profit for 1996 and 1997. They did not show how the alleged loss had come about. The respondent failed to prove the contents and show how their contents were related to the alleged breach of the agreement. No evidence whatsoever was led by the respondent with regard to the computation or breakdown of the loss allegedly suffered therefrom flowing from the breach (see paras 53–54).

(2) The respondent's failure to produce or tender the account books or the necessary support documents upon which the audited statements of account

were based is fatal to his claim for damages. Thus, the audited statements of account and the respondent's oral evidence in connection therewith were inadmissible (see para 55).

(3) In a situation where there is an infringement of a legal right such as this but where there is no basis for ascertainment of the amount of loss suffered, a nominal damage may be awarded (see para 97); *Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113 followed.

[Bahasa Malaysia summary

Rayuan ini adalah terhadap keputusan yang dibuat pada 7 Mac 2005 oleh hakim perbicaraan yang bijaksana Mahkamah Tinggi atas penilaian ganti rugi sahaja. Perayu dan responden telah memasuki satu perjanjian di mana responden mengangkut barangan kepada dan daripada premis-premis kilang perayu. Perjanjian tersebut adalah untuk sepuluh tahun iaitu dari 4 April 1994 sehingga 4 April 2004. Terdapat dua perkhidmatan utama yang diberikan, perkhidmatan pertama ditamatkan pada 15 Februari 1996 dan yang kedua pada September 1997. Adalah menjadi kes responden bahawa penamatan sebelum waktu perjanjian tersebut oleh perayu telah mengakibatkan kehilangan kepada responden seperti yang diplidkan di dalam pernyataan tuntutannya. Responden mengemukakan kepada mahkamah, penyata akaun yang telah diaudit untuk tahun-tahun 1995 sehingga 1999. Perayu menyatakan bahawa akaun yang telah diaudit daripada tahun-tahun 1995 sehingga 1999 yang dirujuk oleh responden tidak menunjukkan bagaimana kehilangan berpunca daripada pelanggaran perjanjian yang dikatakan itu. Perayu berhujah bahawa bil-bil dan bayaran-bayaran, penyata-penyata yang telah diaudit dan dokumen-dokumen pajakan, dengan sendirinya tidak membuktikan kehilangan, sekiranya ada, yang dialami oleh responden. Hakim perbicaraan telah mengetepikan keputusan timbalan pendaftar yang dibuat sebelum itu yang mengawardkan ganti rugi nominal RM500 kepada responden. Hakim perbicaraan mengawardkan jumlah RM750,000 untuk kehilangan keuntungan dan RM150,000 untuk kehilangan modal.

Diputuskan, membenarkan rayuan dan mengetepikan ganti rugi yang diawadkan:

(1) Adalah jelas bahawa penyata-penyata akaun yang dikemukakan dengan sendirinya tidak mencukupi untuk membuktikan tuntutan responden untuk ganti rugi. Mereka hanya menunjukkan keuntungan untuk 1996 dan 1997. Mereka tidak menunjukkan bagaimana kehilangan yang dikatakan itu terjadi. Responden telah gagal membuktikan kandungannya dan menunjukkan bagaimana kandungan tersebut berhubung dengan perlanggaran perjanjian yang dikatakan itu. Tiada keterangan langsung yang diberikan oleh responden berhubungan dengan penghitungan ataupun butiran jumlah kerugian yang dikatakan telah dialaminya yang disebabkan oleh perlanggaran tersebut (lihat perenggan 53–54).

(2) Kegagalan responden mengemukakan buku-buku akaun ataupun dokumen-dokumen sokongan di mana penyata-penyata akaun yang telah diaudit didasarkan adalah mudarat kepada tuntutannya untuk ganti rugi.

Dengan itu penyata-penyata akaun yang telah diaudit dan keterangan lisan responden berhubungan dengan itu tidak dapat diterima (lihat perenggan 55).

(3) Dalam satu situasi di mana terdapat pelanggaran hak undang-undang seperti ini, akan tetapi tiada asas untuk pengiraan amaun kerugian yang dialami, satu ganti rugi nominal boleh diawardkan (lihat perenggan 97); *Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113 diikut.]

Notes

For cases on measure of damages, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2931–2941.

For cases on admissibility of evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2219–2231.

Cases referred to

FACB Bhd v Ho See Sin & Ors [2003] 4 CLJ 677 (refd)
Guan Soon Tin Mining Co v Ampang Estate Ltd [1973] 1 MLJ 25 (refd)
Johnson v Kershaw 63 ER 1059 (refd)
KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627 (refd)
Mediana, The [1900] AC 113 (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (refd)
Sykes v Midland Bank Executor & Trustee Co Ltd [1971] 1 QB 113 (folld)

Legislation referred to

Evidence Act 1950 ss 34, 64

Appeal from: Civil Suit No 22–110 of 1998 (High Court, Pulau Pinang)

KC Tang (Chan Ju Jin with him) (Shearn Delamore & Co) for the appellant.
M Thayalan (See Ching Ling with him) (Thayalan & Associates) for the repondent.

Zainun Ali JCA (delivering judgment of the court):

[1] The appeal before us is against the decision made on 7 March 2005 by the learned trial judge of the High Court on the assessment of damages only. The trial judge had awarded the respondent total damages of RM900,000 together with interest at 8% pa from the date the action was filed until full realisation.

[2] The trial judge had thereby set aside the decision of the deputy registrar made earlier on 5 July 2004 who awarded nominal damages of RM500 only to the respondent.

[3] The question of liability was decided by the said trial judge on 8 June 2001 where he allowed the respondent's claim against the appellant. The trial judge did not make any order on damages but ordered that damages be assessed by the senior assistant registrar. The appellant appealed to the Court of Appeal against both these

orders via Civil Appeals No P–02–614 of 2001 and P–02–1077 of 2001 respectively. On 6 July 2004, the Court of Appeal dismissed both appeals. A

[4] Thus, the threshold position of the appellant's liability was determined.

BACKGROUND FACTS B

[5] The respondent is a company having its registered office at No 2683, 2nd Floor, Jalan Chain Ferry, Taman Inderawasih Butterworth, Pulau Pinang.

[6] The defendant is a company operating at Prai Trade Zone, Prai Industrial Estate Pulau Pinang. C

[7] It is the respondent's case that in or about 1993, one En Ramlan bin Osman (SPI) 'Ramlan') who was then Head of the appellant's Transport Department was encouraged by the appellant company's Group Head of Corporate Planning, one Mr Satoshi Hiramoto that should he (Ramlan) leave the appellant company, the said appellant company will award him the appellant's transport business. D

[8] The said Ramlan then left the appellant company and incorporated the respondent company. E

[9] According to the respondent, the appellant and the respondent entered into a written agreement dated 20 May 1994, wherein the respondent transported goods to and from the appellant's factory premises. The agreement was for ten years ie from 4 April 1994 until 4 April 2004. F

[10] There were two main services rendered by the respondent to the appellant. They were:

(a) Milk Run Truck Services ('MRTS'); and G

(b) Direct Delivery Service ('DDS').

[11] The MRTS started in April 1994 and was terminated on 15 February 1996, whilst the DDS started in April 1994 and was terminated in September 1997. H

[12] It is the respondent's case that the untimely termination of the agreement by the appellant resulted in losses to the respondent as pleaded in its statement of claim.

[13] The respondent's case for damages as pleaded in the statement of claim dated 10 March 1998 is as follows: I

[14] In para six, the respondent had pleaded that 14 trucks were purchased under hire purchase and lease agreements pursuant to the said agreement.

[15] In para 8, the respondent pleaded that as a result of the appellant's breach of the said agreement, the respondent's creditors had repossessed five of their trucks and commenced legal proceeding against the respondent.

[16] The respondent's claim is as follows:

(a) loss of profits at the rate of RM600,000 per year for eight years: RM4,800,000;

(b) balance outstanding to the debtors under the hire purchase agreement: RM 1,335,044.42;

(c) balance owing to Bank Bumiputra Malaysia Berhad: RM700,000.

[17] As the appeal is only as regards quantum of damages, it is now timely to look at the quantum awarded to the respondent.

[18] On 7 March 2005, the learned High Court judge awarded the following to the respondent:

(a) loss of profits: RM750,000;

(b) loss of capital: RM150,000.

and interest at the rate of 8% pa from the date of the action being filed until full realization.

[19] It is the respondent's case that under the 1994 agreement the respondent was to provide 60 units of eight ton bonded trucks each month to transport the appellant's goods to and from the appellant's factory.

[20] Paragraph five of the said agreement provides that the agreement is for a duration of ten years commencing from 4 April 1994 till 4 April 2004.

[21] Pursuant to the agreement, the respondent bought 14 trucks and expended sums of money to establish its office.

[22] It is the respondent's case that in or about early 1996, the appellant breached this agreement; then subsequently the appellant awarded its transport services to its subsidiary, resulting in a decline in the respondent's income derived from providing this transport service to the appellant from RM3,574,323 in 1995 to RM435,920 in 1997 till September. According to the respondent, (pp 112 and 113 of the rekod rayuan) the volume of the business dealing between the appellant and respondent is as follows:

(a) for 1994 the total was RM4,417,443;

(b) for 1995 (until March 1996) the total was RM4,257,732.05;

(c) for 1996 (until March 1997) the total was RM 1,514,618.72;

(d) for 1997 (until March 1998), the total was RM330,257.50.

[23] The above figures, according to the respondent indicate significant reduction in turnover when the MRTS and DDS were terminated. **A**

[24] It is the respondent's case that pp 112 and 113, as explained by Ramlan (SPI), relate to the dealings between the appellant and the respondent where the details of payment are reflected at pp 114 to 201 of the rekod rayuan. **B**

[25] The respondent also indicated the number of trucks they utilized (pp 220–228 of rekod rayuan) and indicated that the respondent also hired or purchased the trucks for the said transport services to the appellant. **C**

[26] The respondent through Ramlan tendered in court its audited statements of account for the years 1995 to 1999 (see exhs P2A, P2B, P2C, P23 and P2E.).

[27] It is the respondent's case that since the MRT was terminated on 15 February 1996 and the DDS terminated in September 1997, the decrease in turnover as reflected in P2A, P2B, P2C, P2D and P2E are indicative of the losses suffered by them as a result of the appellant's breach of the agreement. **D**

[28] It is also the respondent's case that Ramlan's tendering of the audited accounts for the years 1995 till 1999 met with no objection from the appellant. Neither was Ramlan cross-examined on his evidence by the appellant. **E**

THE APPELLANT'S CASE

[29] It is the appellant's case that though the respondent's submission sets out that the issue is one of quantum, there is hardly anything in the respondent's submission to support the said claim for losses arising from the alleged breach of the agreement. **F**

[30] The appellant contends that the audited account for the years 1995 to 1999 referred to by the respondent do not show how the loss is attributable to the alleged breach, bearing in mind that the MRS services was terminated on 15 February 1996 and the DRS was terminated on September 1997. **G**

[31] The appellant went on to submit that no evidence was led to the computation of the loss or losses allegedly suffered. **H**

[32] The appellant submitted that the stacks of bills and payments, the audited statements and the hire purchase documents do not by themselves establish the loss, if any, suffered by the respondent.

[33] The appellant submits that for example, no evidence at all was adduced in support of the loss or losses allegedly suffered whether in the sum of RM6,835,044.42 under para 9 of the statement of claim or otherwise and it is misconceived for the respondent to submit that the appellant is deemed to have accepted all evidence of the respondent regarding the alleged loss. **I**

[34] More importantly, it is the appellant's case that the failure of the respondent to produce the account books or the documents upon which the said audited statements of account were based is also contrary to s 64 Evidence Act 1950 requiring that when documentary evidence is tendered, primary evidence of the document (production of the documents itself) is essential.

[35] According to the appellant the respondent made much of the appellant's failure to object to the audited statements of account.

[36] It is the appellant's case that the fact that the appellant's counsel did not object to the audited statements of account does not render the said document admissible or relevant per Edger Joseph Jr J in *Popular Industries Limittd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360.

[37] The appellant went on to say that the appellant's counsel could not have admitted to the said audited statements of account. This is clear when the appellant had earlier informed the court that the said audited statements were handed in only on the day of the trial itself and that the appellant's counsel had requested for an adjournment to take instructions which the trial judge had clearly refused.

[38] As the relevant excerpt from the notes of evidence would show:

> ... Saya (Ramlan bin Osman (SPI)), kemukakan penyata akaun plaintiff.
>
> Peguam Defendan: Tidak membantah tetapi menarik perhatian dokumen ini baru ditunjuk kepada saya, saya pohon tangguh untuk mendapat arahan dari anakguam saya

[39] Thus, it is the appellant's case that although his counsel had not called for the production of the account books or the necessary support documents, the appellant had never at any point in time, dispensed with formal and proper proof of damages. The appellant was also quick to point out that even the trial judge himself had, in the course of Ramlan's evidence commented as follows:

> Peguam defendan dilihat tidak membantah yang sepatutnya dibantah kerana dokumen ini tak admissible...

[40] The appellant submitted that even if the audited statements of account are admissible (which is denied), they do not show how the alleged losses for the years 1997, 1998 and 1999 had come about. In fact, the appellant's contention is that the audited statements are unhelpful in determining the loss, if any, suffered by the respondent as the respondent had in the period 1 April 1995 up to 31 March 1996 and also for the period up to 31 March 1997 made a profit.

[41] With regards the Transportation Receivables for the years 1994 to 1997 (whether from Sony Logistics (M) Sdn Bhd or Sony Electronics (M) Sdn Bhd), these are not admissible on account of not being tendered as exhibits, even if they were referred to by Ramlan in his evidence.

[42] The point is, as the appellant would contend, the oral evidence of Ramlan as Managing Director, by itself, whether in relation to the audited statements of account or the Transportation Receivables have no probative value whatsoever on account of the inadmissibility of the said documents. Consequently, it is the appellant's contention that they are not obliged to cross-examine on such evidence.

[43] It is pertinent to now scrutinize the judgment on quantum of the trial judge, dated 4 January 2006.

THE TRIAL JUDGE'S AWARD

[44] The trial judge awarded the sum of RM750,000 for loss of profit and RM150,000 for loss of capital. In calculating the amount of RM750,000 as loss of profit, the trial judge relied on the following:

(a) that for the year ending 1995 (the first year of operation), the respondent had suffered a loss;

(b) that for the year ending 1996, the respondent had made a profit of RM158,945 (before taxation);

(c) that for the years ending 1997, 1998 and 1999, the respondent had suffered losses.

[45] The trial judge also found that the Transport Receivables (Sony Logistics (M) Sdn Bhd) for the years 1994 to 1997 and Transport Receivables (Sony Logistics (M) Sdn Bhd) for the years 1994 to 1997 do establish the decline in value of the services rendered to the appellant prior and subsequent to the termination of the services which are as follows:

(1) year ending 31 December 1994: RM4.4m;

(2) year ending 31 December 1995: RM4.2m;

(3) year ending 31 December 1996: RM1.5m; and

(4) year ending 31 December 1997: A further reduction of 40%, that Ramlan's evidence on the respondent's damages was not challenged by the appellant.

[46] So much for the award for loss of profit.

[47] The trial judge also awarded the respondent RM150,000 for loss of capital.

[48] In arriving at this figure, the trial judge based his calculations on the following:

(a) that the audited statements of account (P2A–P2B) do establish that the authorized and paid up capital of the respondent is RM500,000;

(b) that the damages suffered by the respondent as a result of the loss of paid up capital is 30%, ie RM150,000.

[49] Thus, the question before us is this. Had the trial judge acted on the right principles and therefore correctly estimated the amount of damages awarded to the respondent? We shall see.

[50] After having heard counsel for both the appellant and respondent and after having read the cause papers and authorities cited, we find that the trial judge had no basis to set aside the award of nominal damages made by the senior assistant registrar and substituting it with the total damages of RM900,000 plus interest at 8% per annum from date of action filed till full realization.

[51] Our reasons are as follows.

AWARD OF LOSS OF PROFITS: RM750,000

[52] It is clear that the statements of account marked as exhs P2A, P2B, P2C, P2D and P2E are by themselves not sufficient to establish the respondent's claim for damages.

[53] They only show profit for 1996 and 1997. They do not show how the alleged loss had come about.

[54] Even in Ramlan's testimony as evident from pages 69 onwards (rekod rayuan), although details were given, for example, where it is shown that the volume of services reached RM483,278.15 from April 1994 to March 1995 and it was subsequently reduced to a mere RM1.1m in 1996 and plunged to RM300,000 in 1997, the respondent failed to prove the contents and show how their contents were related to the alleged breach of the agreement. No evidence whatsoever was led by the respondent with regard to the computation or breakdown of the loss allegedly suffered therefrom flowing from the breach.

[55] The respondent's failure to produce or tender the account books or the necessary support documents upon which the audited statements of account were based is fatal to his claim for damages. Thus, we find that the audited statements of account and Ramlan's oral evidence in connection therewith are inadmissible.

[56] The case of *Johnson v Kershaw* 63 ER 1059 which was followed in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 illustrates the above position. The Vice-Chancellor in *Johnson v Kershaw* had observed:

> If the account books had been in evidence, the accountant's statement of the results of his examination of those books, as the evidence of a person of skill might be receivable; but, inasmuch as the books were not in evidence, I must decline to receive the deposition of Mr Seet as to their contents.

[57] Though it was put across by the respondent that Ramlan as director of the respondent was also the maker of the audited statements of account and that therefore the said audited statements were properly tendered and accepted at the trial, nothing was further from the truth.

[58] We found nothing in the notes of evidence to show that Ramlan is the maker of the audited statements of account in that he had personal knowledge of the contents or that he had signed the said audited statements. A

[59] Even if Ramlan had in fact been the maker of the audited statements of account, it is still incumbent upon him to produce the books of account upon which the audited statements were based (see *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627 and *Popular Industries Ltd v Eastern Garment* [1989] 3 MLJ 360). B

[60] It was submitted by the appellant's counsel that the said audited statements of account are inadmissible by virtue of the respondent's failure to comply with s 64 Evidence Act 1950 requiring that when documentary evidence is tendered, primary evidence of the document ie the production of the documents itself is essential. C

[61] Mohamed Dzaiddin SCJ (as he then was) in *KPM Khidmat Sdn Bhd v Tev Kim Suie* [1994] 2 MLJ 627 observed thus (at p 631): D

> ... when documentary evidence is tendered, primary evidence of the said document must be adduced except in the cases under s 65 of the Evidence Act 1950.

This appears to be the correct legal position.

[62] In fact, the court in the *KPM Khidmat* observed the case that (at pp 631–632): E

> '... The mere fact that the summary of the particulars were made could never be taken as proving that the contents were correct. It has to be proved by calling the maker to explain the facts and the basis of the calculation of the amount claimed. Moreover the record book upon which the maker based her summary must be in evidence... ' F

[63] Thus, the respondent's failure to observe the evidential requisites in this case would prove to be his undoing.

[64] We find that the respondent made much of the appellant's failure to raise objection to the said audited statements of account, where even the trial judge had himself commented on its inadmissibility. G

[65] This peculiar circumstance is heightened when we found in the notes of evidence that whilst the appellant's counsel did not object to the audited statements of account, he had nevertheless put the court on notice that the said audited statements were handed in only on the day of the trial itself. He then requested the court for an adjournment to take instructions but this request was however refused. H

[66] Edger Joseph Jr J in *Popular Industries Ltd v Eastern Garment Manufacturing* [1989] 3 MLJ 360 cited *Sarkar on Laws of Evidence* as follows: I

> ... An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties...

[67] Thus, even though the appellant's counsel had not called for the production of the accounts books or the necessary support documents the appellant had never at any point in time dispensed with formal and proper proof of damages (see *Guan Soon Tin Mining Co v Ampang Estate Ltd* [1973] 1 MLJ 25).

[68] By the same token we find that the appellant was not obliged to cross-examine Ramlan on his oral evidence thereon, when it is clear that the said audited statements of account and oral evidence were irrelevant and insufficient to establish the respondent's claim to damages.

[69] We might add that the mere fact that the audited statements were marked as exhibits in no way formalize their existence in the absence of correct and proper tendering thereof. This is especially true when the respondent had failed to discharge their duty to properly tender or prove the said audited statements.

TRANSPORTATION RECEIVABLES FOR THE YEARS 1994 to 1997

[70] The Transportation Receivables [AR 114 to 201] and Truck Utilization Schedules [AR 220 to 228] are documents disclosed in the respondent's bundle of documents. However, the Transportation Receivables for 1994 to 1997 whether from Sony Logistics (M) Sdn Bhd or from Sony Electronics (M) Sdn Bhd are not admissible in that the documents upon which the Transportation Receivables were based had not been produced or tendered in court.

[71] Likewise, the truck utilization schedules were also not tendered or marked. At the end of the trial, both the Transportation Receivables and truck utilization schedule were not formally proved nor admitted as evidence.

[72] Although the notes of evidence indicate that Ramlan is the maker of the Transportation Receivables, there is nothing in the evidence to show that the said documents were source documents upon which the said audited statements of account were based.

[73] Thus, even if the authenticity of the statements was not called into question, it is still incumbent upon the respondent to prove their contents and to show how they are related to the alleged breach of the agreement (if respondent were to depend on the said documents to prove its case).

[74] We would go further and say that even if the source documents, ie account books were in evidence, the one vital link which is missing is the presence of a person of skill of whom Ramlan is not one.

[75] This person of skill is required on the strength of s 34 of the Evidence Act 1950 to prove the entries and documents as he is 'someone having personal knowledge of the transactions reflected in such entries...'

[76] His 'skills' would be critical in this case in giving professional input as regards, inter alia: **A**

(a) the percentage of the loss;

(b) whether the loss is due to the loss of a particular contract;

(c) in calculating gross margin or the net margin; **B**

(d) in calculating gross margin or the net margin;

(e) chart the performance of the company etc.

[77] As in the *Popular* case, there was also a set of purportedly audited accounts but which lack: **C**

(a) books to substantiate the statements;

(b) accountant/accountants who themselves audited the accounts to testify to the truth and accuracy of the statements. **D**

[78] If the said accounts were to be admitted, then someone is to testify from where they were obtained.

[79] Thus, in the absence of that person of skill to prove the respondent's documents, the respondent's claim for damages remain obscure, unacceptable and consequently inadmissible. **E**

[80] The essence of all these is that the burden of proof in terms of admissibility and relevancy never shifted from the respondent. **F**

[81] The respondent was at pains to distinguish the authorities relied upon by the appellant (ie *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 and *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627) on the grounds that the said cases do not involve audited accounts being tendered as evidence. **G**

[82] However, it is our view that this distinction has no basis since the nature of an audited account in the instant case is no different from the 'sheet of calculations' tendered in the *Popular* case, or the 'summary of accounts' tendered in the *KPM Khidmat* case, as these documents are nothing more than general *conclusions* or *results* from the books of account or record books **H**

[83] Thus, it would follow that the principles as adopted in both the *Popular* and *KPM Khidmat* cases remain binding and applicable. **I**

[84] The respondent's attempt to fortify his position and lend credence to his audited accounts by citing the case of *FACB Bhd v Ho See Sin & Ors* [2003] 4 CLJ 677 fell through. The respondent contended that the audited account of a company

may be used to determine the profitability or otherwise of a company. However, this is actually unhelpful to the respondent when the said audited account had not been properly tendered or proved.

[85] In fact, the *FACB* case is distinguishable from the instant case and would countermand the respondent's position, since in the *FACB case* both the plaintiff and the defendant agreed that the said financial years were properly audited and they had no quarrel with that and that the auditor of the audited statements was in fact called to testify on the audited atatements in question...' However, this is not so in the instant case.

THE TRIAL JUDGE'S AWARD OF RM150,000

[86] We find that the trial judge's award of RM150,000 as damages for loss of capital is without basis having regard firstly to the fact that the respondent had not, in their writ of summons and statement of claim even pleaded or claimed for loss of capital.

[87] The trial judge indicated that he computed this amount by referring to the authorized and paid-up capital of RM500,000 in the audited statements of account.

[88] However, bearing in mind our conclusion that:

(a) the said statements of account are inadmissible;

(b) the fact that no other evidence was adduced by the respondent to establish the amount of capital that had been invested in the business;

(c) that no evidence had been adduced by the respondent to establish the manner in which the capital had been employed in the business;

(d) that no evidence had been adduced by the respondent to establish how the capital had been depleted or used up as a result of the breach of the said respondent,

the trial judge's award of RM 150,000 was unsupported by any evidence and was therefore capricious.

[89] To compound the problem, the trial judge had himself expressed misgivings about the respondent's claim to damages and in fact had made no award of damages on 7 November 2001, ie the day fixed for decision on damages but had instead instructed the senior assistant registrar to assess damages, notwithstanding that written submissions on the issue of damages had already been filed (as directed by him).

[90] In the light of the evidence before us, we find that it is irrefutable that the respondent in seeking the damages as set out in the statement of claim has the burden of proving both the fact and the amount of damages before he can recover.

[91] In this case, apart from the fact that the said audited statements of account, Ramlan's oral evidence on the said statements and his evidence in relation to

documents are all not formally proved are inadmissible evidence, the said evidence in themselves do not in any event establish that the respondent had suffered any damage nor shown the nature and extent of the loss allegedly suffered as a result of the appellant's breach of contract.

[92] As a consequence of the above, we find that the amount of damages awarded by the trial judge to the respondent to be arbitrary and clearly wrong.

[93] The next question is whether the award of RM500 as nominal damages handed down by the senior assistant registrar was correct and justified.

NOMINAL DAMAGES

[94] Nominal damages may be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. Although this is one of many situations in which nominal damages may be awarded, 'it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss' (see *McGregor on Damages*, Chapter 10).

[95] In the instant case, the issue is one of proof rather than absence of loss. It is an absence of evidence of the amount of loss.

[96] As Lord Halsbury LC succinctly stated in *The Mediana* [1900] AC 113:

> ... Nominal damages is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.

[97] In the instant case, we find that the respondent has clearly failed to prove this loss which was allegedly suffered from the appellant's breach of contract. In a situation where there is an infringement of a legal right such as this but where there is no basis for ascertainment of the amount of loss suffered, a nominal damage may be awarded (see *Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113).

[98] My learned brother, James Foong JCA and my learned sister, Zaleha Zahari JCA have seen this judgment in draft and are in agreement with it. In view of the above, it is the decision of the court that the trial judge had clearly erred in awarding the said amount of damages he did. In the circumstances, we unanimously allow the appeal with costs, set aside the damages awarded by the trial judge and restore the nominal damages of RM500 as awarded by the senior assistant registrar. Deposit of appeal to be refunded to appellant.

Appeal allowed with costs.

Reported by Sally Kee